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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-453

ACF INDUSTRIES, INCORPORATED, CARTER CARBURETOR DIVISION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals**
**for the Eighth Circuit**

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IN THE

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ACF INDUSTRIES, INCORPORATED, CARTER CARBURETOR DIVISION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

Petitioner ACF Industries, Inc., Carter Carburetor Division, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which issued a writ of mandamus commanding the district court to vacate a discovery order imposing sanctions on respondent Equal Employment Opportunity Commission ("EEOC").

### OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri are reported at 76 F.R.D.

143 and reproduced as Appendix A hereto. The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 577 F.2d 43, is set forth in Appendix B. The order of the Court of Appeals denying rehearing and rehearing en banc is annexed as Appendix C.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1978. Petitioner's timely petition for rehearing was denied on June 22, 1978. This petition is being filed within 90 days of June 22, 1978.

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Did the Court of Appeals disregard the controlling decisions of this Court and circumvent the long-established policy against piecemeal appeals by issuing a writ of mandamus commanding the district court to vacate a discovery order?

2. Did the Court of Appeals exceed the scope of its authority and depart from accepted practice by issuing a writ of mandamus when none of the procedures of Rule 21 F.R.A.P. had been invoked or complied with, when mandamus had not been requested, and when its propriety had not even been briefed?

3. Did the Court of Appeals properly hold that the district court had "exceeded its judicial power" by imposing discovery sanctions which are specifically authorized by Rule 37, Fed. R. Civ. P.?



## STATUTES AND RULES INVOLVED

This case involves 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure, as well as Rule 37 of the Federal Rules of Civil Procedure; the relevant portions of each of these are set forth in Appendix D.

## STATEMENT OF THE CASE

This case began in 1970 when a charge of racial discrimination was lodged against petitioner by a civil rights organization and by several non-employees. It was based on a single alleged incident of discharge and a single charge of failure to promote. In 1972, a second charge was filed on behalf of a female employee challenging several of petitioner's pregnancy leave policies. Following termination of conciliation talks by the EEOC, this lawsuit was filed in 1975. In its complaint, respondent made broad, general allegations of discrimination that far expanded the scope of the original charges and literally encompassed every facet of petitioner's business over a ten-year period, including such unrelated matters as garnishment policy, insurance plans, reference checks, pension and disability plans, apprenticeship programs, recruitment policies, newspaper and magazine advertisements, discipline, demotions and employment tests. In its prayer for relief, respondent sought, *inter alia*, back pay for "those persons adversely affected by the unlawful employment practices described above."

Many months after giving respondent access to all of its employment files, petitioner, on August 12, 1976, propounded a short set of interrogatories asking respondent to identify by name the individuals who had allegedly been discriminated against, other than those listed in the original triggering

charges.[1] The EEOC did not answer this set of interrogatories, nor did it object or seek a protective order. Instead, it filed what was denominated a "motion to stay" its responses. The district court denied the motion to stay, holding that there was no reason to delay the discovery sought by petitioner.

A month later, counsel for petitioner wrote to respondent's attorney demanding answers to the subject interrogatories and threatening to seek an order dismissing the action if such answers were not forthcoming. Finally, on December 20, 1976, respondent filed some so-called answers, but the responses to the critical questions simply avoided those inquiries by stating that respondent "is unable at this time to identify other individuals until it has completed its discovery."

Since the district court, by previously denying respondent's Motion for Stay, had ordered the EEOC to answer the questions, petitioner filed a Motion for Sanctions under Rule 37, asking either that the complaint be dismissed or, alternatively, that the Commission be prohibited from offering any evidence of discrimination against any individuals other than those mentioned in the underlying charges. The parties, at the court's urging, attempted to resolve their differences, but the EEOC refused to change its "answers" previously filed, and the district court thereupon granted in part petitioner's Motion for Sanctions. It refused to dismiss the complaint but entered an order under Rule 37 which (a) prohibited the Commission from offering evidence at trial as to discrimination against any individuals other than those named in the triggering charges, (b) established as a fact for purposes of this lawsuit that petitioner had not discriminated against anyone with the possible exception of those individuals, and (c) assessed attorney's fees of $500

[1] Petitioner's earlier attempt to obtain this information by way of a comprehensve set of interrogatories had virtually been ignored by respondent.



against respondent. These sanctions are expressly authorized by Rule 37.

Respondent did not request the district court to certify its order for immediate appeal under 28 U.S.C. §1292(b), but merely filed a notice of appeal under §1291. In response to petitioner's motion and suggestions that the Court of Appeals was without jurisdiction, respondent (a) invoked the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), and (b) also contended that the sanctions order was appealable under §1292(a)(1) because it was tantamount to the denial of an injunction. At no time did respondent file a petition for a writ of mandamus or suggest anywhere in its brief or reply brief that mandamus was being sought or was appropriate.

The Court of Appeals skirted the jurisdictional issue with the following observation:

> "Because we find that the district court exceeded its power in issuing the sanctions order and mandamus is an appropriate remedy, we do not reach the jurisdictional contention raised by the parties." 577 F.2d at 45; App. p. A-9, *infra*.

Then, having raised the question of the propriety of mandamus *sua sponte*, it issued an extraordinary writ commanding the district court to withdraw its discovery order. The court cited no authority supporting its action and engaged in no discussion whatever concerning the purpose of Rule 37. The kernel of the court's opinion appears in the statement that:

> ". . . we find that the district court exceeded its judicial power in limiting the evidence which the EEOC can present in this case." 577 F.2d at 48; App. p. A-16, *infra*.

A timely petition for rehearing and rehearing en banc was denied.

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I. The Issuance of an Extraordinary Writ to Overrule a Trial Court's Discovery Order Is Inconsistent With Decisions of This Court Restricting Appellate Review of Interlocutory Orders and Prohibiting the Use of Mandamus as a Substitute for an Appeal.

As recently as the end of the last Term, this Court reiterated the fundamental and well-settled proposition that appellate courts should not interfere with an on-going judicial proceeding except in the most extraordinary and egregious circumstances. In *Coopers & Lybrand v. Livesay*, 46 U.S.L.W. 4757, 4758-59 (June 21, 1978), the Court unanimously said:

> "Federal appellate jurisdiction generally depends on the existence of a decision of the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' . . . The finality requirement in §1291 evinces a legislative judgment that 'restricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.' "

The Court in *Coopers & Lybrand* emphasized that the finality requirement was designed, in part, to maintain an appropriate relationship between the trial courts and the appellate courts, a goal which was said to be "very much worth preserving." *Id.* at 4761. On the same day it decided *Coopers & Lybrand*, the Court also disapproved efforts to expand appellate jurisdiction under §1292(a)(1) by rejecting the very same jurisdictional argument made by respondent below. *Gardner v. Westinghouse Broadcasting Corporation*, 46 U.S.L.W. 4761.[2]

[2] Respondent's reliance on *Cohen v. Beneficial Industrial Loan Corporation*, *supra*, was also shown to be inappropriate by the *Coopers & Lybrand* and *Gardner* opinions.



In the instant case, the Court of Appeals, thus foreclosed from appellate jurisdiction, simply executed an end-run around the finality requirement by, *sua sponte*, labelling its interlocutory action a writ of mandamus. This approach was taken in spite of the maxim, acknowledged in passing by the Court, that "the writ is not to be used as a substitute for appeal . . ." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). The Eighth Circuit also disregarded the clear message of *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976):

> "A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress."

See also *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953).

In addition to its incompatibility with the purposes of the final judgment rule, the Eighth Circuit's unusual action was also patently at odds with this Court's subsequent ruling in *Will v. Calvert Fire Insurance Company*, 46 U.S.L.W. 4811 (June 23, 1978). In *Will*, the Court held that the appellate court had impermissibly used a writ of mandamus to interfere with the district court's discretion to control its own docket. In the process, the plurality opinion for the Court reaffirmed the general principles governing mandamus, *viz:* (1) the Court of Appeals may issue a writ of mandamus only when necessary or appropriate in aid of its jurisdiction; (2) a mere showing of error is insufficient to justify a writ of mandamus; (3) mandamus is appropriate only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so; and (4) the party seeking mandamus must bear the burden of showing that its right to the issuance of the writ is "clear and indisputable." *Id.* at 4813. The Court cautioned against the use of mandamus as a substitute for an appeal and, in footnote 7, 46 U.S.L.W. at 4814, quoted ap-

provingly from *Will v. United States*, 389 U.S. 90, 98 n. 6 (1967):

> "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labelling such an 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous."

Bearing in mind that the discovery order at issue in the present case was specifically authorized by Rule 37 and that matters pertaining to discovery are within the discretion of the trial judge, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), the following observation of the plurality in *Will v. Calvert Fire Insurance Company, supra* at 4814, would appear to be dispositive of the instant case:

> "Where a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' "

So it is here. The district court was operating in an area committed to its discretion. Even if its order could be argued to have been erroneous, correction must await a final judgment:

> "The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' " *Schlagenhauf v. Holder, supra* at 112.

The action of the Court of Appeals was contrary to the letter of *Will* and to the spirit of *Coopers & Lybrand*. The Eighth Circuit has seriously disturbed the balance which this Court has striven to maintain between the trial courts and the appellate courts.[3]

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[3] Since both *Coopers & Lybrand* and *Will* were decided after the May 30th ruling of the Eighth Circuit, perhaps the judgment should be summarily vacated and the Court of Appeals permitted to reexamine its approach in light of these intervening decisions.



## II. The District Court's Order Did Not Amount to a Judicial "Usurpation of Power," and Any Error Could Be Corrected on Appeal From a Final Judgment.

The Court of Appeals did not indicate in its opinion why it deemed the "drastic" remedy of mandamus necessary or even appropriate in this case. It expressed the view that the district court had "exceeded its judicial power" by issuing its sanctions order, but in the context of the entire opinion, this pronouncement must be viewed as nothing more than a disagreement with the district court's approach to the discovery problems in this case.

The Court of Appeals plainly departed from the governing rule announced in *Kerr v. United States District Court, supra* at 402:

> ". . . The fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' "

Just as the opinion below overlooks the proper role of mandamus, it also fails to explain why correction of the so-called error on appeal after final judgment would be inadequate. Obviously, any error in the admission or exclusion of evidence can be redressed on appeal at the conclusion of the case. That is certainly true here. On the other hand, the utilization of mandamus to supervise discovery orders or evidentiary rulings would create chaos and would further overburden the already inundated appellate courts. In *Will v. Calvert Fire Insurance Company, supra* at 4814, the Court sounded the following warning:

> "Although the District Court's exercise of its discretion may be subject to review and modification in a proper interlocutory appeal, . . . we are convinced it ought not to be overridden by a writ of mandamus."

Far from constituting even an abuse of discretion, let alone a "usurpation of power," the district court's order in this case not only comports precisely with Rule 37 but also has at least the implicit imprimatur of this Court. In *National Hockey League v. Metropolitan Hockey Club, Inc., supra,* the Court reinforced the discretion of the trial bench to put teeth into the discovery rules and to discourage abuses by litigants. A trial judge's dismissal of a complaint under Rule 37 for abuse of discovery was summarily reinstated by this Court, which cautioned appellate courts to tread carefully when reviewing such orders. These considerations are particularly apropros in light of the EEOC's tactics in the instant case which, unfortunately, are all too commonplace. Once again, overreaching by the appellate courts in discovery matters requires the attention of this Court.

## III. The Court of Appeals Erred by Issuing a Writ of Mandamus When None Had Been Sought and When the Question Had Been Neither Pleaded Nor Briefed.

Although Rule 21 of the Federal Rules of Appellate Procedure contains the procedural mechanism for implementing 28 U.S.C. § 1651 with respect to extraordinary writs, the Court of Appeals totally ignored the procedural devices and safeguards contained in the Rule. Its issuance of a peremptory writ, *sua sponte,* is not only unprecedented, but is indicative of a disturbing disregard for the proper way of doing things. As a consequence, petitioner had no opportunity to brief or argue the appropriateness or validity of mandamus in the circumstances presented.

It is ironic that the Court of Appeals, while accusing the district court of exceeding its power, itself did precisely that by assuming appellate jurisdiction of a non-final interlocutory



order by the simple expedient of branding it mandamus. It is also paradoxical that the Court of Appeals, while castigating the trial judge for failure to comply with the rules, issued a writ in complete and utter disregard of the applicable rules.

## CONCLUSION

For the reasons stated, a writ of certiorari should be issued to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

In the United States District Court
Eastern District of Missouri
Eastern Division

Equal Employment Opportunity Commission,
Plaintiff,
v.
Carter Carburetor, Division of ACF Industries, Incorporated, et al.,
Defendants.
No. 75-635C (2)

### Memorandum and Order

(Filed February 10, 1977)

This matter is before the Court on defendant's Motion for Sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure.

This case was filed in 1975 by the Equal Employment Opportunity Commission (EEOC) charging defendant in general terms with various types of discriminatory activities through the years. It was based upon one charge of race discrimination filed by Wendell Holmes, Charles Gamble, Otha Lewis and Charles Peoples and one charge of sex discrimination (pregnancy) filed on behalf of Sandra Moore.

After an initial unsuccessful attempt by defendant to obtain information concerning the particulars of the allegations, defendant filed a second set of interrogatories on August 12, 1976.

In Interrogatories Nos. 1 through 6, defendant sought the names of the particular individuals who plaintiff claimed had been illegally discriminated against, other than the individuals named in the underlying charge. The EEOC initially filed a Motion to Stay its answers to those interrogatories until it had completed its discovery. On November 4, 1976, we denied that motion and held that discovery should be provided. After some prodding by the defendant, the EEOC on December 16, 1976, filed what is denominated as its "Supplemental Answers to Defendant's Second Set of Interrogatories" in which it stated in response to Interrogatories Nos. 1 through 6 that "the Commission is unable at this time to identify other individuals until it has completed its discovery." It is obvious that the EEOC has not in fact answered the interrogatories and has wilfully ignored the Court's order of November 4, 1976, denying the requested stay.

Defendant's Motion for Sanctions under Rule 37 charges that the EEOC has no evidence of any discriminatory acts that its persistent refusal to admit that fact constitutes a serious violation of the discovery rules. The Court heard oral argument on that motion on February 4, 1977, and although it appeared that the parties had twice previously met or communicated in an effort to resolve this matter, the Court suggested another meeting should be held and made clear to the parties that if the matter was not resolved the Court would act promptly on the motion. By letter dated February 9, 1977, the Court has been advised by counsel for defendant that the EEOC refuses to change its so-called "answers" to Interrogatories Nos. 1 through 6. In our judgment, sanctions are appropriate under the circumstances.

The federal discovery rules are designed, *inter alia*, to enable a defendant to elicit the basis for a plaintiff's allegations and to prepare his defenses to the charges made. They are not designed to permit a plaintiff to make broad-based allegations, without any basis for a belief in those allegations, and then to invade the



defendant's records in an attempt to determine whether or not a cause of action exists. Yet, that is obviously what has happened in the instant case. The EEOC's repeated refusal to answer legitimate and crucial questions in this case is indefensible and leads the Court to the inevitable conclusion that the Rules are properly invoked. *National Hockey League v. Metropolitan Hockey Club*, 44 U.S.L.W. 3754 (U.S., June 30, 1976); *Anderson v. Air West, Inc.*, 542 F. 2d 1090 (9th Cir. 1976).

Under Rule 37(b)(2)(C), one of the remedies specified for actions such as those which have occurred here is dismissal of the action. Defendant has sought dismissal, but the Court believes that such a sanction is too harsh at this time because the questions which plaintiff refused to answer inquired only as to individuals other than those specified in the triggering charge. Therefore, the EEOC should be permitted to offer evidence as to discrimination against the specified individuals. However, because of its refusal to identify any other persons, the Court will utilize the provisions of Rule 37(b)(3)(A) and (B) to limit the issues to be tried. *Life Music, Inc. v. Broadcast Music, Inc.*, 41 F.R.D. 16 (S.D.N.Y. 1966); *Black v. Sheraton Corporation of America*, 371 F. Supp. 97 (D.D.C. 1974).

Rule 37 authorizes the Court, in addition to other sanctions to require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. We find no justification for the failure of EEOC to respond. There are no circumstances which make an award of attorney's fees unjust. Limiting our award to the time and effort of which we have actual knowledge which counsel for defendant has expended in seeking to obtain proper answers to the interrogatories, we find that an attorney's fee of $500 is reasonable.

Accordingly, for the reasons stated, defendant's Motion for Sanctions is hereby SUSTAINED and it is hereby ORDERED:

For the purposes of this action, the following facts shall be taken to be established:

(1) The defendant Carter Carburetor Company did not discriminate against any person on the basis of race, with the possible exception of Wendell Holmes, Charles Gamble, Otha Lewis, or Charles Peoples, as to which individuals plaintiff shall bear the burden of proof at trial;

(2) The defendant Carter Carburetor Company did not discriminate against any person on the basis of sex, with the possible exception of Sandra Moore, as to whom the Commission shall bear the burden of proof at trial.

IT IS FURTHER ORDERED that at the trial of this matter the plaintiff shall be prohibited from offering any evidence as to any discrimination by defendant against any persons other than Wendell Holmes, Charles Gamble, Otha Lewis, Charles Peoples or Sandra Moore.

IT IS FURTHER ORDERED that the plaintiff shall pay to defendant Five Hundred Dollars ($500.00) attorneys fees incurred as a result of plaintiff's failure to provide discovery.

Dated this 10th day of February, 1977.

/s/ JOHN K. REGAN
United States District Judge



**APPENDIX B**

United States Court of Appeals
For the Eighth Circuit

No. 77-1657

Equal Employment Opportunity Commission,

Appellant,

v.

Carter Carburetor, Division of ACF Industries, Inc.; International Union, United Automobile, Aerospace & Agric. Implement Workers Local 819 and International Union, United Automobile, Aerospace & Agric. Implement Workers of America,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: March 16, 1978
Filed: May 30, 1978

Before BRIGHT and ROSS, Circuit Judges, and LARSON,* Senior District Judge.

ROSS, Circuit Judge.

* The Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

The Equal Employment Opportunity Commission (EEOC) appeals from a discovery sanctions order entered by the district court on February 10, 1977. The defendants, Carter Carburetor, Division of ACF Industries, Inc., Local 819 of the United Automobile, Aerospace and Agricultural Implement Workers of America, and the international union, moved to dismiss the appeal for lack of jurisdiction. That motion was denied without prejudice on November 2, 1977, and is presently before this court along with the merits.

I

On July 17, 1975, the EEOC filed suit against Carter Carburetor and the union defendants pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The EEOC alleged that the defendants had discriminated on the basis of race with regard to hiring, promotion, apprenticeship, training, job classification, and discharge. It also alleged sex discrimination with regard to maternity leave and disability benefits. It sought to permanently enjoin the defendants from engaging in any employment practice which discriminates because of race or sex. It also sought an order that the company institute and carry out policies, practices and affirmative action programs providing equal employment opportunities for Negroes and women to eradicate the effects of past discrimination; an order that the company make whole the persons adversely affected by the unlawful employment practices; and other necessary and proper relief.

The complaint was based upon a charge of racial discrimination filed with the EEOC by Wendell Holmes, Charles Gamble, Otha Lewis, and Charles Peoples; and on a charge of sex discrimination filed on behalf of Sandra Moore.

Since its inception this litigation has been plagued by discovery problems caused, to some extent, by antagonistic and noncooperating counsel from both the company and the EEOC.



The order in dispute arose from Carter Carburetor's second set of interrogatories which was served on the EEOC on or about August 13, 1976. Through these interrogatories Carter Carburetor sought, *inter alia*, identification of every individual who had been affected by each discriminatory policy alleged. The EEOC requested a stay on answering the 11 interrogatories seeking identification of discriminatees. That motion was denied on November 4, 1976, and the EEOC filed its supplemental answers on December 20, 1976. It responded, essentially, that it would be unable to identify other acts of discrimination until it had completed discovery. It stated that, in accordance with Rule 26(e) of the Federal Rules of Civil Procedure, it would supplement its responses to the interrogatories.

On December 30, 1976, Carter Carburetor moved for sanctions against the EOC for its wilful refusal to answer interrogatories.[1] The motion was set for argument on February 4, 1977. However, at that time, the district court ordered the parties to confer and reach a conclusion.

When no satisfactory resolution was reached by February 10, 1977, the district court entered its memorandum and order finding that, under the circumstances, sanctions were appropriate. The court found that dismissal was too harsh a sanction because the questions which the EEOC had not answered concerned only individuals other than those specified in the triggering charges. The following order was entered on February 10, 1977:

> For the purposes of this action, the following facts shall be taken to be established:

---

[1] Although there had been negotiations prior to November 4, 1976, this particular motion was not preceded by a motion to compel different answers to the interrogatories nor a discovery negotiating conference pursuant to Rule 7(c)(5) of the Court Rules for the Eastern District of Missouri.

(1) The defendant Carter Carburetor Company did not discriminate against any person on the basis of race, with the possible exception of Wendell Holmes, Charles Gamble, Otha Lewis, or Charles Peoples, as to which individuals plaintiff shall bear the burden of proof at trial;

(2) The defendant Carter Carburetor Company did not discriminate against any person on the basis of sex, with possible exception of Sandra Moore, as to whom the Commission shall bear the burden of proof at trial.

IT IS FURTHER ORDERED that at the trial of this matter the plaintiff shall be prohibited from offering any evidence as to any discrimination by defendant against any person other than Wendell Holmes, Charles Gamble, Otha Lewis, Charles Peoples or Sandra Moore.

IT IS FURTHER ORDERED that the plaintiff shall pay to defendant Five Hundred Dollars ($500.00) attorneys' fees incurred as a result of plaintiff's failure to provide discovery.

The EEOC filed a motion to reconsider, which was denied, and then appealed from the sanctions order.

II

*Jurisdiction.*

Carter Carburetor contends that the sanctions order is not appealable and this court does not have jurisdiction of the purported appeal. The EEOC argues that the order is immediately appealable under the collateral test of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Alternatively, the EEOC contends that since the effect of the order is to prevent it from proving the nature, extent and duration of Carter Carburetor's discriminatory policies, it will not be able to get injunctive relief against many discriminatory practices alleged in its com-



plaint. Thus, the EEOC argues, it is appealable under 28 U.S.C. § 1292(a)(1) as a denial of an injunction.

Because we find that the district court exceeded its power in issuing the sanctions order and mandamus is an appropriate remedy, we do not reach the jurisdictional contention raised by the parties.

We acknowledge that mandamus is not to be used as a substitute for appeal. *See Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), *citing Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). However, the writ is appropriate when there is "usurpation of judicial power" or "a clear abuse of discretion." *Schlagenhauf v. Holder, supra*, 379 U.S. at 110, *citing Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953). After reviewing the history of discovery in this case and the manner in which the sanctions order was entered, we find this an appropriate case for the issuance of a writ of mandamus.

III

*Discovery Background.*

Because the history of discovery significantly influenced our decision we will set forth, in detail, what has transpired.

In the course of discovery the EEOC has filed two sets of interrogatories addressed to defendant Carter Carburetor. Through its first set of 11 interrogatories, filed on August 18, 1975, the EEOC sought detailed information about Carter Carburetor's computer or electronic data processing equipment, including but not limited to, locations of computers, programming information, and capabilities of the computers.

On September 17, 1975, Carter Carburetor filed objections to these interrogatories as irrelevant to the issues. It contended that most of the computer information requested was confi-

dential and privileged trade secrets. It further alleged that the assembly of the information sought would require the expenditure of hundreds of man-hours of time and was oppressive and burdensome.

Although the EEOC filed a second set of interrogatories on September 22, 1975 (see below), it filed a motion for an order to compel answers to the first set of interrogatories on October 14, 1975. That motion was denied on November 26, 1975, and the EEOC was ordered to amend its first set of interrogatories.

On December 9, 1975, the EEOC filed its amended first set of interrogatories. It continued to seek computer information, including software, but narrowed its request to equipment used for the input, storage or retrieval of personnel information. It also asked about Carter Carburetor's maintenance of computer files containing personnel information.

Carter Carburetor again objected to these types of interrogatories as being irrelevant and not designed to lead to the discovery of any admissible evidence. It again contended that the computer program information was a privileged trade secret.

On August 31, 1976, the EEOC's second motion for an order to compel answers to its first set of interrogatories was overruled.

The EEOC filed its second set of 65 interrogatories on September 22, 1975, shortly after Carter Carburetor objected to its first interrogatories. Included in the second set of interrogatories were detailed questions about labor organizations representing Carter Carburetor's employees; the racial composition of various positions within the company since July 2, 1965 (the effective date of Title VII); the job qualifications for each job category; lines of progression in each department; information contained in any log or record the company main-



tained of job applicants or apprenticeship applicants; information about the company's employee recruitment, hiring and apprenticeship committees and their policies; all individuals hired since July 2, 1965, their race, date of hire, referral source, job title, pay rate and department; applicant rejections, their race and the reason for rejection; whether any positions in the company had never been filled by a black person, or had never been filled by a white person; any testing program for hiring or promotional purposes; a job description for each position at the company; the company's training programs, transfer policy and policy regarding disciplinary action and demotions; the company's layoff, recall and discharge policies; employee benefit plans; whether employees retain their seniority and benefit rights while on maternity leave; and names of all employees who had been granted either temporary or maternity leave since July 2, 1965.

On November 10, 1975, Carter Carburetor filed its objections to the EEOC's second set of interrogatories. It contended that the time frame, from July 2, 1965, to the date of the answers, was overbroad and irrelevant and, therefore, the interrogatories were oppressive and burdensome. It next alleged that the EEOC's requests for information concerning general policies and practices were "totally unrelated to the only specific and possibly valid charge of employment discrimination upon which the Commission statutorily bases its lawsuit against [Carter Carburetor]." Carter Carburetor alleged that the EEOC's complaint was barren of factual allegations and it was using the discovery process to ascertain the basis for the lawsuit. It did not answer any of the EEOC's second set of interrogatories.

The EEOC filed a motion for an order to compel answers to its second set of interrogatories on April 9, 1976. In its memorandum in support of this motion the EEOC alleged that the parties had met informally on two occasions in an

attempt to resolve their discovery problems. It admitted that Carter Carburetor had produced material relevant to its maternity leave policies and had agreed to allow the EEOC access to the personnel records of approximately 2,000 current employees and 15,000 inactive employees. However, Carter Carburetor had restricted access to the records of current employees to nonbusiness hours. Furthermore, the records were arranged alphabetically rather than chronologically. The EEOC contended that the restrictions imposed an unreasonable and unnecessary burden on it. It also contended that Carter Carburetor had failed to answer or specifically object to each interrogatory individually. The district court did not rule on this motion until August 31, 1976, when it ordered Carter Carburetor to make separate answers or specific objections to each interrogatory.

On October 7, 1976, Carter Carburetor, pursuant to the August 31 order, filed its answers and objections to the EEOC's second set of interrogatories. It made a general objection to the time frame for which information was sought, and gave specific answers to, or indicated that it would offer access to files containing the answers to, the interrogatories. The EEOC contends that it was not until this date, October 7, 1976, that it was able to begin meaningful inspection and analysis of Carter Carburetor's personnel files.

Carter Carburetor also filed two sets of interrogatories. Its first set of 107 interrogatories was filed on September 2, 1975. Carter Carburetor asked, *inter alia*, the names of the charging parties and the charges upon which the law suit was predicated; for production of documents reflecting information about the charges filed with the EEOC; the names of persons with information about the charges and production of their statements or reports; facts constituting the basis for the charges of continuing racial and sexual discrimination in the various respects alleged; the names of persons with information about



the alleged continuing discrimination and production of their statements; and other practices and policies that the EEOC contended violated Title VII.

On October 7, 1975, the EEOC filed its answers and objections to Carter Carburetor's interrogatories. It agreed, pursuant to Rule 33(c) of the Federal Rules of Civil Procedure, to make available at its Chicago office, the files underlying the litigation "to the extent that they are available in answer to the Interrogatories propounded by Defendant * * * for inspection and copying at a time to be agreed upon by counsel." The EEOC also answered Carter Carburetor's interrogatory number 2, giving information about the underlying charges. None of Carter Carburetor's 106 other interrogatories was specifically answered. In answer to all requests for documents and other production the EEOC stated:

> The Commission's "Log of Conciliation Efforts", intra-office memorandum, and EEO-1 Reports will not be voluntarily produced to counsel for [Carter Carburetor], and the Commission objects to answering the interrogatories requesting identification thereof further on the ground that the information sought is irrelevant and its production would violate §§ 706(b) and 709(e) of Title VII, as amended, 42 U.S.C. § 2000e-5(b), 8(c) (Supp. II, 1972).

The EEOC further objected to the production of any abstract documents or records prepared by their attorneys as being privileged attorney work product, where the underlying information is available to Carter Carburetor. Finally, the EEOC objected to answering Carter Carburetor's interrogatories because the assembling of answers would be unduly burdensome and oppressive and Carter Carburetor "already has the facts in their possession."

No further action was taken on these interrogatories and on August 13, 1976, Carter Carburetor filed its second set of 17

interrogatories. It is those questions that underlie the sanctions order presently before this court. Carter Carburetor requested the names of individuals and dates of incidents of discrimination for every allegedly discriminatory act not involving one of the charging parties (numbers 1-11).[2] It also sought the names and addresses of persons with knowledge of discriminatory practices against the charging parties (number 12); information about EEOC investigations of five specific charges against Carter Carburetor (numbers 13-16); and the EEOC's "determination" in each of those five charges (number 17).

On September 3, 1976, the EEOC responded. It moved to stay answering interrogatories numbers 1 through 11, requesting information on other acts of discrimination, until Carter Carburetor answered the EEOC's interrogatories; it objected to interrogatories numbers 12 through 16 on the basis of relevancy; and it answered interrogatory number 17 stating that the exhibits were true copies of its determinations in the five charges.

Carter Carburetor opposed the EEOC's stay motion and also filed a motion for an order to compel the EEOC to answer interrogatory number 12. No other interrogatory was mentioned in that motion.

On November 4, 1976, the district court overruled the EEOC's motion to stay its answers to the 11 interrogatories and sustained Carter Carburetor's motion to compel the EEOC to answer interrogatory number 12.

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[2] It is interesting to note that both of Carter Carburetor's sets of interrogatories requested information which the EEOC could not have provided prior to inspection of the personnel records of Carter Carburetor. Although Carter Carburetor offered the EEOC access to its personnel records at a negotiating conference in March of 1976, it had not at that time, provided specific, and individual answers to the EEOC's interrogatories. It was not until October 7, 1976, that the EEOC could conduct a meaningful analysis of those records.



The EEOC supplemented its answers to Carter Carburetor's second set of interrogatories on December 20, 1976. In response to every interrogatory requesting names of individuals who had been discriminated against and dates of the alleged acts of discrimination, the EEOC stated:

> (a) The Commission is unable at this time to identify other individuals until it has completed its discovery. The Commission will in accordance with Rule 26(e) of the Federal Rules of Civil Procedure, supplement responses to the Defendant Carter Carburetor's Second Set of Interrogatories to Plaintiff.
>
> (b) The Commission is unable at this time to state the date of each alleged act of discrimination until it has completed discovery.

Without any further objection to these responses or a motion to compel further answers, on December 30, 1976, Carter Carburetor filed a motion for sanctions against the EEOC because of its wilful refusal to answer interrogatories. After filing its sanctions motion Carter Carburetor denied the EEOC further access to its personnel records.[3]

*The Sanctions Motion and Order.*

On February 4, 1977, the parties appeared for argument on Carter Carburetor's motion for sanctions. After Carter Carburetor presented its case for the sanctions order, the EEOC contended that the motion was inappropriate since there had been no motion to compel and no compliance with a local court rule pertaining to a discovery negotiating conference. Carter Carburetor contended that all the prerequisites to a sanctions motion had been met. The district court did not rule on the

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[3] During this discovery period the parties also bickered over requests for admissions, depositions, and the production of documents.

sanctions order at that time. Instead he ordered the parties to confer. He stated that if the parties did not come to a conclusion he would entertain motions to compel and for sanctions on Monday (February 7, 1977).

The EEOC apparently agreed to supplement its answers within 15 days. This was not satisfactory to Carter Carburetor and the company's attorney wrote a letter to the district judge stating that the court should take action under Rule 37(b) of the Federal Rules of Civil Procedure in accordance with Carter Carburetor's pending motion. Without allowing the EEOC to respond, the district court entered its sanctions order on February 10, 1977.

## IV

Because of the way in which *both parties* have proceeded, or failed to proceed with discovery, and the manner in which the sanctions order was entered, we find that the district court exceeded its judicial power in limiting the evidence which the EEOC can present in this case.

It can readily be seen, in reviewing the record, that *both* the EEOC and Carter Carburetor have displayed dilatory tactics during the discovery period. Numerous motions to compel discovery have been filed. Subsequent to denial of its motion requesting a stay in answering the last of Carter Carburetor's interrogatories, the EEOC *did* file purported responses. Carter Carburetor filed no formal objection to those responses and no motion to compel further answers.[4] Instead the company immediately filed its motion for sanctions.

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[4] Carter Carburetor contends, and the district court found, that the December 20, 1976 responses filed by the EEOC were, in fact, not answers to the interrogatories, and the EEOC had "wilfully ignored" the order denying the EEOC's motion to stay. We cannot agree with this characterization of wilful disobedience. The EEOC did attempt to respond and was given no notice that its responses were not satisfactory prior to Carter Carburetor's motion for sanctions.



Although the motion was set for argument on February 4, 1977, the EEOC never had the opportunity to present its position. After the EEOC contended that the motion was premature, the district court ordered the parties to meet in an attempt to resolve their differences. At that meeting the EEOC agreed to supplement its responses within 15 days. For some reason that was not satisfactory to the company.

After receiving an ex parte letter from Carter Carburetor and without ever hearing from the EEOC, the district court entered its order on February 10, 1977. We find these procedures leading to the sanctions to be highly irregular. We also note that the record is clear that the dilatory tactics of Carter Carburetor, in regard to discovery, are at least the equal of the tactics of the EEOC. This is a classic case of abuse of the discovery process.

For these reasons we issue an order of mandamus ordering the district court to withdraw its order of February 10, 1977. However, we do not condone the dilatory actions of either party and we suggest that the district court establish a strict, but reasonable, timetable for the continuation of discovery in the matter, requiring full cooperation from the attorneys for Carter Carburetor as well as the EEOC. All costs of this action shall be taxed to Carter Carburetor.

It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

## APPENDIX C

United States Court of Appeals
For the Eighth Circuit

77-1657 September Term, 1977

Equal Employment Opportunity Commission,
Appellant,
vs.
Carter Carburetor, etc., et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellee, Carter Carburetor and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 22, 1978



## APPENDIX D

### Title 28, United States Code

**§ 1651. Writs**

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

### Federal Rules of Civil Procedure

**Rule 37**

FAILURE TO MAKE DISCOVERY: SANCTIONS

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(b) **Failure to Comply with Order.**

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such

orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or



the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

* * * * * * *

(f) **Expenses Against United States.** Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

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**Federal Rules of Appellate Procedure**

**Rule 21**

WRITS OF MANDAMUS AND PROHIBITION DIRECTED TO A JUDGE OR JUDGES AND OTHER EXTRAORDINARY WRITS

(a) **Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.** Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reason why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) **Denial; Order Directing Answer.** If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not hereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.



(c) **Other Extraordinary Writs.** Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and b) of this rule.

(d) **Form of Papers; Number of Copies.** All papers may be typewritten. Three copies shall be filed with the original, but the court may direct that additional copies be furnished.